Index.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 166.

J. HOWARD JOHNSON, as Receiver of All the Rents and Profits Issuing Out of Premises Situated on the Northeasterly Corner of Green and Beaver Streets, in the City of Albany, New York, and WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, County Treasurer of the County of Albany; YETTA V. SANDLER, JOHN CARROLL, L. BERMAN, NEW YORK STATE LIQUIDATING CORP., FEDERAL INVESTORS, Inc., "JOHN DOE" and "MARY ROE," Said Last Two Names Being Fictitious, Being All Tenants, Occupants and Claimants Under Any of the Tax Sales Described in the Complaint Whose Names Are Unknown to the Plaintiffs,

Respondents.

Brief of Respondents, Yetta V. Sandler, John Carroll and L. Berman in Opposition to Petition for Writ of Certiorari.

Statement of the Case.

The Statement of the Case contained in the petition for the Writ of Certiorari is, in the main, correct, except that the statements therein contained as to the value of the premises are purely opinionative rather than factual, and in any event are entirely irrelevant to the question of law here involved. Furthermore, the petitioners fail to state that the real property in question, while in possession of the receiver, was sold for delinquent tax liens in numerous years prior to the sales in question, and was sold for tax liens for the years 1940, 1941 and 1942, while the receiver was still in possession and collecting the rents thereof.

Opinions Below.

The opinion of the Special Term of the Supreme Court, Albany County, New York, may be found at page 85 of the record. The opinion of the Appellate Division of the Supreme Court, Third Department, is reported in 272 Appellate Division 6. The opinion of the Court of Appeals is reported in 297 New York, 165.

ARGUMENT.

Summary of Argument.

Point 1. The jurisdictional statement of the petitioner does not comply with Rule 12 of the Rules of the Supreme Court in that it does not specify how and where the alleged Federal question was raised in the Courts below, and no Federal question was raised in said Courts.

Point 2. The neglect of the County Treasurer to obtain leave of the Court before a tax sale of property in the hands of a receiver is not a jurisdictional defect making the sale invalid.

Point 3. There was no denial of due process or equal protection of the law under the Federal or State constitutions.

POINT 1.

The jurisdictional statement of the petitioner does not comply with Rule 12 of the Rules of the Supreme Court in that it does not specify how and where the alleged Federal question was raised in the Courts below, and no Federal question was raised in said Courts.

Under Rule 12 of the Rules of Supreme Court, the petitioner must specify the method and manner in which the Federal question was raised in the Court of original jurisdiction and in the Appellate State Courts. The petition herein is totally lacking in this respect. As a matter of fact the Federal question of due process under the 14th amendment was never mentioned until the petitioner made application for the Writ herein. This is sufficient to deny the petition.

U. S. vs. Rimer, 220 U. S. 547.

The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment.

Hamblin vs. Western Land Co., 147 U. S. 531.
Wilson vs. North Carolina, 169 U. S. 586.
Miller vs. Sacramento Drainage District, 256 U. S. 129.

U. S. Fidelity & Guarantee Co. vs. Oklahoma, 250 U. S. 111.

The petitioners having failed to present any Federal question as to the alleged denial of their rights under the 14th amendment to the State Courts, they are estopped from raising the question now. No such question was raised by the briefs or argument of counsel nor was such question considered in the opinion of the Court of original jurisdiction or the opinions of the Appellate State Courts.

Federal questions which the highest State Court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of a writ of error from the Federal Supreme Court.

Hulbert vs. Chicago, 202 U. S. 275.
Cox vs. Texas, 202 U. S. 446.
Tidal Oil Co. vs. Flanagan, 263 U. S. 444.

Petitioners are therefore precluded from asserting the alleged denial of a Federal right for the first time on this application.

Appleby vs. Buffalo, 221 U. S. 524.
Wilson vs. Cook, 327 U. S. 474.

POINT 2.

The neglect of the County Treasurer to obtain leave of the Court before a tax sale of property in the hands of a receiver is not a jurisdictional defect making the sale invalid.

Sales for taxes may not be set aside for any defect or irregularity in the proceeding, but only for such defects or irregularities as are jurisdictional and invalidate the entire proceeding.

Failure to obtain leave of the Court to sue a receiver has never been considered in the State of New York a jurisdictional defect nor does it invalidate the proceeding, *ab initio.*

> "In this state failure to obtain permission to sue a domestic receiver is an irregularity merely which is punishable as for a contempt, and can be cured or waived at any stage of the action. (*Taylor vs. Baldwin,* 14 Abb. Pr. 166; *DeGroot vs. Jay,* 30 Barb. 483; *Hubbell & Curran vs. Dana,* 9 How. Pr. 424; *James vs. James Cement Co.,* 8 N. Y. St. Repr. 490.)"

LeFevre vs. Matthews, 39 A. D. 232.
Pruyn vs. McCreary, 105 A. D. 302, 304.
Moore vs. Potter, 155 N. Y. 481, 490.

Justice Desmond concurring in the result in the Court of Appeals in this case, said:

> "I concur in the result on the ground that failure to get leave to foreclose is not jurisdictional. (*Chautauqua County Bank vs. Risley,* 19 N. Y. 369, 376, 377) and so this suit does not lie."

Johnson vs. Smith, 297 N. Y. 165, 174.

POINT 3.

There was no denial of due process or equal protection of the law under the Federal or State Constitutions.

No question is raised by petitioners as to the validity of the assessment and as to the procedure followed by the County Treasurer in conducting the tax sales.

> "It is acknowledged that the County Treasurer complied faithfully with all applicable provisions of law of city charter and tax statutes."
>
> *Johnson vs. Smith,* 297 N. Y. 165, 170.

Nor do the petitioners question the validity of any law or statute under which the County Treasurer acted. Their sole contention here is that the County Treasurer in conducting a tax sale of property in the hands of a receiver, without asking leave of the Court, violated a rule of the common law. The common law, however, is what the Court state it to be. Petitioners admit in their brief (p. 15) "that no one has a vested right in a rule of the common law."

The ruling of the State Courts on a question of construction and application of a rule of common law cannot be considered a denial of due process or equal protection of the law.

The question is not a novel one. The State Courts have consistently held that a County Treasurer delegated with the sovereign taxing power, must obey the law's mandate and sell the property no matter by who owned —whether by incompetent, infant, trustee or receiver.

> *Levy vs. Newman,* 130 N. Y. 11.
> *County of Nassau vs. Day,* 266 A. D. 738, affirmed 291 N. Y. 732.

Bonded Municipal Corp. vs. Carodix Corp., 266 A. D. 737, affd. 291 N. Y. 733.

The decision of a State Court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property.

Tracy vs. Ginzberg, 205 U. S. 170.
Enterprise Irrigation District vs. Farmer's Mut. Canal Co., 243 U. S. 157.
Fox River Paper Co. vs. Railroad Commission, 274 U. S. 651.

Even if it were considered *arguendo*, that the Court of Appeals erred herein in its decision, while acting within its jurisdiction, it must be accepted as a correct exposition of the law of the State, common, statutory, and constitutional, and the only inquiry can be, does the State law, as applied, afford due process?

In re Converse, 137 U. S. 624.
Worcester County Trust Co. vs. Riley, 302 U. S. 292.

The cases cited by petitioners are not germane to the issue. Nothing said or decided by this Honorable Court in *re Tyler*, 149 U. S. 164, can be considered as authority for the proposition that the tax sales herein were a denial of due process or equal protection of the law. In the *Tyler* case there was involved a federal statutory receiver who had been placed by the Federal Court in charge of a railroad property, and had taken not only possession but title thereto. A sheriff had seized the property for delinquent taxes in violation of two successive orders enjoining him from interfering with the receiver's possession.

In the instant case, however, the receiver never took title nor does the order appointing him enjoin the County Treasurer or anyone else from proceeding against the receiver. As said by Justice Fuld in his opinion herein;

> "It may well be that court approval is required if in possession is a statutory receiver or trustee or a receiver or trustee appointed by a court pursuant to a statute—such as the Federal Bankruptcy Act—granting extremely broad powers. Quite apart from any other consideration, under the Bankruptcy Act, title to the property vests in the trustee (Bankruptcy Act, 70; U. S. Code, tit. 11, 110). A receiver in partition, on the other hand, obtains no title to the property (*Rinehart vs. Hasco Building Co.*, 153 App. Div. 153, affd. 214 N. Y. 635); title remains vested in the owners who are the parties to the partition action. As is evident from the order of appointment, the receiver is given merely the right to manage the premises on behalf of those owners until the action has been concluded."

Johnson vs. Smith, 297 N. Y. 165, 171, 172.

It is respectfully submitted that petitioner's application for a Writ of Certiorari herein should be denied.

Respectfully submitted,

MAURICE FREEDMAN,
JACK GOODMAN,
Of Counsel.